



25 Triangle Park Drive • P.O. Box 617 • Concord, NH 03302-0617

Tel. 603/226-4481 • Members Toll Free 1-800-646-2758
Fax 603/226-2322 • Members Toll Free 1-800-262-9507
Email: plt@nhmunicipal.org • www.nhmunicipal.org

MEMORANDUM

TO: Department of Environmental Services

FROM: Maura Carroll, General Counsel

DATE: December 9, 2002

RE: Rules for the Protection of Instream Flow on Designated Rivers

This memorandum was prepared for the administrative rules hearing on the proposed rules for the protection of instream flow on designated rivers, Chapter Env-Ws 1900. The New Hampshire Municipal Association understands that the Department is proposing rules in response to the legislature's adoption of Chapter 278 of the Laws of 2002 and restricts its comments to the implications of Part I, Article 28-a of the New Hampshire Constitution on the proposed rules.

While it is true that there is a provision that addresses a municipality's lack of compliance with the provisions of the proposed rules, its construction requires the legislative body to "opt-out" of compliance rather than to "opt-in" to compliance by vote of the legislative body. As the Department is aware, the text of the constitutional amendment is:

The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

We at NHMA interpret Part I, Article 28-a to mean that in order for such programs or responsibilities to be approved for funding by a vote of the local legislative body, officials in the municipality make the decision whether to put the vote to the legislative body. That is, an affirmative vote by the legislative body must occur in order to move forward, but the constitution does not require the vote to take place simply because the State fails to fund the program. Part I, Article 28-a does not require that a city or town take a vote on every potential mandate. If a municipality

wants to determine whether the voters would approve funding for a specific program, there is a process to put that issue before the voters. In town meeting towns, the governing body controls what goes before the voters, or voters themselves can submit a petition to put an article on the warrant. In city or town council towns, the members of the legislative body determine what will be on their agenda. We do not believe that the language of Article 28-a changed this local process. If the State has not provided adequate funding for a new or expanded program or responsibility, the constitution allows a local appropriating authority, its legislative body, to "opt-in" to a program by choosing to fund it. It does not allow the State to mandate a new or expanded program or responsibility without providing funding and assume the local government will fund it unless it votes to "opt-out" of the program. That would allow the State to do indirectly what the constitution forbids the State to do directly.

We understand that grant money may be available to municipalities to fund the cost of compliance with these rules. However, the fact that grant money may be available does not guarantee that all mandated costs to a municipality would be covered by these grants or that all municipalities would receive them.

We recognize that staff at the Department has attempted to ease the burden to municipalities, yet still achieve compliance with the rules, and we applaud the Department's efforts. However, we do not believe that these attempts have relieved the unfunded mandate costs to municipalities in a constitutional manner. Therefore, we urge the Department to amend the rules to insure that communities may exercise their option to fund the costs of compliance without being required to "opt-out" of the rules requirements, but rather to "opt-in" to assume the costs mandated by the adoption of Env-Ws 1900.

Thank you for your consideration and for the opportunity to be heard on this issue.